IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.7.2009

CORAM:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR.JUSTICE RAJA ELANGO

Writ Appeal Nos.1596 and 1597 of 2000
& C.M.P.Nos.13636 to 13638 of 2000

M/s.Target Marketing,
A.P.750, 94th Street,
15th Floor, K.K.Nagar,
Chennai-600 078. .. Appellant in both the Writ Appeals

vs.

1. The Central Excise and Gold Control
(Appellate) Tribunal,
Sastri Bhavan Annexe,
Chennai-6.

2. The Commissioner of Central Excise (Appeals),
121, Nungambakkam High Road,
Chennai-34.

3. The Superintendent of Central Excise,
O/o the Suptdt. Of Central Excise,
Maduravoyal II Range,
Chennai II Division,
473, Anna Salai, Chennai-35.

4. The Additional Commissioner of Central Excise,
O/o The Commissioner of Central Excise,
121, Nungambakkam High Road, Chennai-34.

.. Respondents in both the Writ Appeals

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Writ Appeal No.1596 of 2000 filed under clause 15 of Letter Patent Act against the order dated 5.9.2000 passed by the learned single Judge in Writ Petition No.7085 of 2000 on the file of this Court.

Writ Appeal No.1597 of 2000 filed under clause 15 of Letter Patent Act against the order dated 5.9.2000 passed by the learned single Judge in Writ Petition No.7086 of 2000 on the file of this

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Court.

WP Nos.7085 & 7086/2000:

Petition filed under Article 226 of the constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records of the 1st Respondent in order Nos.2465 & 2466/99 dt.24.9.99 in E/1256 & 1257/99 and E/ST/623 & 624/99 and quash the same in so far the pre-deposit of Rs.10 lakhs is concerned and consequently direct the 2nd respondent to hear the Appeal on merits without any pre-deposit/condition respectively.

For appellant : Mr.B.Sathish Sundar
For respondents: Mr.P.Mahadevan, SCGSC for RR-2 to 4

JUDGMENT

(Judgment of the Court was delivered by S.J.MUKHOPADHAYA,J)

The Revenue directed the appellant-assessee to pay the duty under Section 11-A of the Central Excise Act, 1944 (for short, 'the Act') and also imposed penalty under Section 11-AC of the Act. In one of the orders, it was ordered to pay a sum of Rs.14 lakhs (approximately) towards excise duty, with equal amount towards penalty and in the other order, the appellant-assessee was asked to pay Rs.12 lakhs (approximately) towards excise duty, with equal amount of penalty thereon.

2. Against the said orders of the Revenue, two different appeals were preferred before the Customs, Excise and Gold (Control) Appellate Tribunal (for short, 'CEGAT'), South Zonal Bench, Chennai, by the appellant-assessee, under Section 35-B of the Act, along with a petition for dispensing with the deposit of duty and penalty so demanded in terms of the proviso to Section 35-F of the Act. By order dated 24.9.1999, the CEGAT ordered to pay a total sum of Rs.10 lakhs.

3. The learned single Judge, having confirmed the said order dated 24.9.1999 passed by the CEGAT, the present Writ Appeals have been preferred by the appellant-assessee.

4. Learned counsel appearing on behalf of the appellant-assessee submitted that the assessee brought to the notice of the CEGAT the undue hardship it will face, if it is ordered to pre-deposit the requisite amount. A prima-facie was also made out to grant such relief.

5. Per contra, the stand taken by the learned counsel appearing for the Revenue was that all the facts having been taken into

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consideration, the CEGAT reduced the amount to Rs.10 lakhs, to be paid as pre-deposit amount for hearing the appeals.

6. We have heard the learned counsel appearing for the parties and perused the records.

7. Learned counsel appearing for the appellant-assessee brought to our notice that the assessee-Company was in continuous loss for several years, as certified by the Chartered Accountants, which was accepted at the time of the assessment made by the Income Tax authorities and the following lossess were shown and accepted:

(i) Year ended 31.3.1998---Rs.40,18,190/-
(ii) Year ended 31.3.1999---Rs.11,84,112/-
(iii) Year ended 31.3.2000---Rs.15,22,363/-

8. So far as the merits of the cases are concerned, it was suggested that there was a very excellent prima-facie case in favour of the assessee and thereby, the assessee was not liable to pay any amount towards the duty/penalty as sought for.

9. Learned counsel for the appellant-assessee referred to one or other order passed by the CEGAT, West Zonal Bench, Mumbai, as confirmed by the Supreme Court.

10. It is brought to our notice that the appellant-assessee manufactures "Uninterrupted Power Supply" systems (for short, 'the UPS') and supplies the same without batteries, which are purchased from other sources and delivers directly to the buyers' premises. According to the assessee, the value of battery is not includible in assessing the value of UPS, as per Section 4 of the Act.

11. In the case of "Commissioner of C.Ex.&Cus.,Pune-1 vs. A.Z.Electronics" reported in 2001 (134) E.L.T. 689 (Tri.-Mumbai), the CEGAT, West Zonal Bench, Mumbai, having noticed that the battery is not manufactured by the assessee therein, but only arranged to supply to the buyers of UPS a a trading activity, the value of battery not includible in assessable value of UPS, the CEGAT held that the battery cannot be held to be the essential part of the UPS for determining the includability of those batteries in the value of the UPS. The excise duty is on the manufacture. If a person manufactures incomplete machine, apparatus or equipment, the value at which these incomplete materials are liable to duty, cannot be determined by adding to it prices of parts or components they would be required to make a machine complete. The appeal preferred by the Commissioner of Central Excise, was dismissed by the CEGAT.

12. In fact, similar was the view of the CEGAT, West Zonal Bench, Mumbai, in the case of the assessee-Target Marketing, Mumbai.

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The Commissioner of Central Excise, Mumbai, also preferred an appeal in E/970/00-MUM, against the order dated 31.12.1999, which was passed in favour of the appellant-assessee by the Commissioner of Central Excise (Appeals), Mumbai. The CEGAT, West Zonal Bench, Mumbai, by its order dated 22.4.2002, noticed that there were two questions for consideration in that appeal, namely the classification of UPS manufactured by the assessee therein and inclusion in the value of such UPS the batteries for such machines that is supplied. Giving reference to the decision in the case of "Luminous Electronics Pvt. Ltd. vs. CCE", reported in 2001 (129) ELT 605, which was confirmed by the Supreme Court while disposing of the appeal filed by J.K.Synthetics Ltd. (Civil Appeal No.9175 of 1995), the CEGAT confirmed the correctness of the classification determined by the Commissioner (Appeals). The appeal preferred by the Commissioner of Central Excise, Mumbai was dismissed by the CEGAT with a specific observation that the UPS supplied by the assessee therein does not include the batteries, which were not necessarily related to the manufacture of UPS.

13. We have noticed the aforesaid facts to find out as to whether a prima-facie case has been made out by the appellant herein (assessee) and prima-facie whether the appellant was liable to pay any amount towards excise duty/penalty, by adding value of the battery with the valuation of the UPS. The financial condition of the appellant-assessee-Company has been noticed, including the losses sustained by it at the relevant point of time to find out undue hardship.

14. It is true that on merely establishing a prima-facie case, a person is not entitled for exemption from payment of pre-deposit amount. But, if on a cursory glance, it appears that the demand raised has no legs to stand, then it would be undesirable to require the assessee to pay the full or substantive part of the demand. Such view was taken by the Supreme Court in the case of "M/s.Pennar Industries Ltd. vs. State of A.P. and others" in Civil Appeal of the year 2009, arising out of SLP(C).No.22684 of 2007, decided on 9.2.2009.

15. In the present case, as the appellant-assessee-Company has shown undue hardship towards its financial condition and that the demand as raised, has prima-facie no legs to stand, we are of the view that it will be undesirable to ask the appellant-assessee to pay the full or substantive part of the demand.

16. We accordingly set aside the order dated 24.9.1999 in Appeal Nos.E/ST/623, 624/99 and E/1256, 1257/99, Final Order Nos.2465 and 2466 of 1999, Stay Order Nos.1563 and 1564 of 1999, passed by the CEGAT, South Zonal Bench, Chennai and also the impugned order dated 5.9.2000 passed by the learned single Judge in Writ Petition

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Nos.7085 and 7086 of 2000.

17. The cases are remitted to the first respondent-CEGAT, Chennai, to decide the appeals on merits without asking the appellant-assessee to deposit any pre-deposit amount in terms of Section 35-F of the Act.

18. The Writ Appeals are allowed with the aforesaid observations. No costs. C.M.Ps. are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Central Excise and Gold Control
(Appellate) Tribunal,
Sastri Bhavan Annexe, Chennai-6.

2. The Commissioner of Central Excise (Appeals),
121, Nungambakkam High Road, Chennai-34.

3. The Superintendent of Central Excise,
O/o the Suptdt. Of Central Excise,
Maduravoyal II Range,
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473, Anna Salai, Chennai-35.

4. The Additional Commissioner of Central Excise,
O/o The Commissioner of Central Excise,
121, Nungambakkam High Road, Chennai-34.

+2ccs to Mr.B.Sathish Sundar, Advocate Sr 34746,34747
+1cc to Mr.P.Mahaadevan, Advocate Sr 33855

MSM(CO)
km/5.8.

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